APPENDIX A.

(Order of Illinois Supreme Court, case No. 39,688, dated March 15, 1966. No opinion was filed. Certified in Record A, pg. 2).

State of Illinois, } ss.
Supreme Court. }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the fourteenth day of March in the year of our Lord, one thousand nine hundred and sixty-six, within and for the State of Illinois.

Be It Remembered, that, to-wit: on the 15th day of March, A. D. 1966, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois, Appellee, No. 39,688 vs. Kenneth A. Green, Appellant.	Appeal from Circuit Court, Coles County, 65-Y-261.

And now, on this day, the Court having diligently examined and inspected the record and proceedings aforesaid as well as the briefs and argument filed herein, and now being fully advised in the premises is of the opinion, finds and adjudges that this Court has no jurisdiction on direct appeal in this case.

Therefore, it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court for the Fourth District of the State of Illinois, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Appellate Court.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 30th day of March, A. D. 1966.

(Seal) /s/ Mrs. Earle Benjamin Searcy,
Clerk,
Supreme Court of the State of Illinois.

APPENDIX B.

(Opinion of Illinois Appellate Court. Paragraphs numbered by this Petitioner for convenience in making reference. Certified in Record C.)

State of Illinois.

Appellate Court,
Fourth District.

Filed July 25, 1966. Robert L. Conn, Clerk,
Appellate Court, 4th District.

General No. 10758. Agenda No. 66-20.

People of the State of Illinois,
Plaintiff-Appellee,
vs.
Kenneth A. Green,
Defendant-Appellant.

Appeal from
Circuit Court,
Coles County.

Craven, J.:

(1). The defendant was found guilty by a jury on four counts of forgery and three counts of theft. The court

denied probation and entered a sentence of three to ten years on all counts. The defendant was attorney for Thomas Wickham, representing him in a claim for personal injury. Both the forgery and theft counts relate to the defendant's settlement of his client's claim, execution of certain instruments and retention of the entire proceeds.

(2). The defendant contends that under Counts I, II, III and IV, alleging forgery, there was insufficient evidence to prove an intent to defraud because the defendant had implied authority to settle the case as he saw fit and that he later tried to negotiate a settlement with his former client.

(3). The defendant further contends that Counts V, VI and VII pertain to the same act of theft and thereby subject him to double jeopardy; that Counts V, VI and VII fail to state an offense; that under Counts V, VI and VII the evidence fails to show an intent to permanently deprive the owner of his property. The defendant also contends that erroneous instructions were given to the jury, and finally argues that probation should have been granted and that the sentence was excessive.

(4). The personal injury action was first filed in Cumberland County and later dismissed and refiled in the Eastern District of the United States District Court at Danville, Illinois. Thereafter Mr. and Mrs. Wickham moved to Florida and on July 31, 1963, the defendant settled the claim for $15,000.00. He failed to advise the Wickhams of the settlement and on September 26, 1963, wrote a letter to Mr. Wickham stating that the case had not been settled and would probably go to trial in December of 1963.

(5). A release and stipulation were executed on August 12, 1963. The Wickhams' names were signed in their

absence. On the same date the defendant received a draft for $15,000.00 payable to "Thomas Wickham and Sophronia Wickham, his wife, . . . and Kenneth A. Green, their attorney." The Wickhams did not endorse the draft. However, their names were affixed thereto and testimony of the handwriting expert established that the signatures on the release and the draft were written by the same person. The defendant thereafter deposited the entire proceeds in his personal account, although he had an escrow account at the same bank.

(6). The defendant made several phone calls to the Wickhams in Florida concerning the suit. Thereafter the Wickhams returned to Illinois, retained other attorneys, and made demand upon the defendant for the proceeds. No part of the settlement proceeds has been paid by the defendant to the Wickhams. The defendant argues he stands ready to surrender the proceeds less his contingent basis attorney's fee.

(7). The defendant was indicted for theft and forgery which arose out of the same course of conduct. The defendant alleges that Counts V, VI and VII violate his right against double jeopardy under the state and federal constitutions. Counts V, VI and VII relate to the same alleged theft of $15,000.00. Under ch. 38, sec. 16-1, Ill. Rev. Stat. 1963, subparagraphs (1), (2) and (3) define separate intents, each of which is sufficient to allege the offense of theft. The only material distinction between Counts V, VI and VII is the intent alleged. Conceivably the defendant could possess the intent and state of mind to be guilty under each count of the indictment and subparagraph of the statute. Conceivably he may be proven guilty of only two of the counts, one, or none. However, he is only guilty or innocent of one crime, theft. This is true despite the alternative nature of the counts as pleaded. These are not separate crimes arising out of the

same conduct. They are separate counts alleging the same crime in the alternative as defined by statute.

(8). Jeopardy attaches at the time a jury is empaneled and sworn. **People v. Friason**, 22 Ill. 2d 563, 565, 177 N. E. 2d 230, 231 (1961). Jeopardy attached here once, not twice. It attached to one offense, theft, as alleged in alternative Counts V, VI and VII. The constitutional provisions relied upon by the defendant (United States Constitution, Amendment V, and Illinois Constitution, art. II, sec. 10) and the cases cited by the defendant all relate to the protection from being tried more than once for the same offense. Even if the defendant had been convicted on one count of theft and acquitted on the others, the defense of double jeopardy would not be available. **People v. Minor**, 20 Ill. 2d 496, 499, 170 N. E. 2d 555, 556 (1960). Under Counts V, VI and VII the defendant was tried only once for a single offense in a single prosecution. He received a single sentence and the jury's verdict of guilty under the counts as pleaded was not inconsistent.

(9). The defendant contends that Counts V, VI and VII are insufficient to state an offense in that subparagraphs (1), (2) and (3), defining intent, relate only to subsection (d), defining an offense where the property was "stolen by another". The defendant argues that reliance upon the language of subparagraphs (1), (2) and (3) requires the State to allege the offense as defined in subsection (d), and that having failed to do so Counts V, VI and VII fail to state an offense as defined by statute. It is apparent that subparagraphs (1), (2) and (3) refer to the intent required to be alleged under all subsections, (a) through (d). This is apparent from the Committee Comments, S. H. A., ch. 38, sec. 16-1, and the express holding of the First District Appellate Court in **People v. Nunn**, 63 Ill. App. 2d 465, 473-74 (212 N. E. 2d 342, 346 (1965)), wherein the Court stated:

"The scheme of the code's drafters is that the lettered subsections (a), (b), (c) and (d) describe the proscribed acts any one of which constitutes the crime of theft if performed with the mental states requisite for conviction; and that subsections (1), (2) and (3) describe such mental states or conduct from which they will be presumed. See Committee Comments to this section, S. H. A., ch. 38, . . . [sec.] 16-1."

(10). The defendant argues that the proof under all counts of the indictment is insufficient to prove an intent to defraud. The defendant asserts that there was no proof of secrecy or concealment. However, a close examination of the facts recited earlier discloses that he affirmatively concealed the fact of settlement from his client after depositing the proceeds to his personal account. The defendant has never surrendered the proceeds to his client, and the fact that he now asserts that he stands ready to do so is in no way probative of his intent at the time he committed the acts charged under these counts. Restitution, promised or performed, is not a defense to theft or forgery.

(11). The defendant raises objection to two instructions, People's instruction 12 and People's instruction 23. People's instruction 12 defined "intent to defraud" as follows:

"An intent to defraud means an intention to cause another to assume, create, transfer, alter or terminate any right, obligation or power with reference to any person or property."

The defendant argues that this was improper because the indictment did not define "intent to defraud". This language was in the words of the statute. The fact that it was not defined by the indictment is further reason for its definition by instruction. The objection to People's

instruction 23 follows the same line of reasoning as the defendant's previous contention that the charges alleging theft were insufficient by combining subparagraphs (1), (2) and (3) with subsection (b) of ch. 38, sec. 16-1, Ill. Rev. Stat. 1963. The instruction set forth the pertinent portion of the above statute, including subparagraphs (1), (2) and (3) under subsection (b), as follows:

> "23. A person commits theft when he knowingly:
>
> (a) Obtains or exerts unauthorized control over property of the owner; or
>
> (b) Obtains by deception control over property of the owner; and,
>
> (1) Intends to deprive the owner permanently of the use or benefit of the property;
>
> (2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or
>
> (3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit."

For the reasons set forth earlier, this instruction is a proper statement of the law under this statute.

(12). In conclusion, the defendant argues that the court was arbitrary in denying probation and entering an excessive sentence of three to ten years. The granting or refusing of probation is a matter of discretion, **People v. Hamby**, 6 Ill. 2d 559, 129 N. E. 2d 746 (1955). We will not recite or re-evaluate the facts of this case or the circumstances considered by the trial court in entering sentence. It is sufficient to note that this offense was one of a serious nature by a person vested with public confidence and trust. The trial court was fully informed by hearing the evidence of the substantive offense and ex-

tensive evidence in connection with the application for probation. This sentence is not disproportionate to the offense.

The judgment and sentence of the circuit court of Coles County is, therefore, affirmed.

Affirmed.

Trapp, P. J., and Smith, J., concur.

APPENDIX C.

(Order of Illinois Supreme Court, case No. 40209, dated January 11, 1967. No opinion was filed. Certified in Record D, pg. 18).

State of Illinois,
Supreme Court. } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January in the year of our Lord, one thousand nine hundred and sixty-seven, within and for the State of Illinois.

Be It Remembered, that, to-wit: on the 11th day of January, 1967 the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois, Appellee,	}	Appeal from Appellate Court Fourth District 65-Y-261 10758
No. 40209 vs.		
Kenneth A. Green, Appellant.		

And now, on this day, the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the motion of the appellee to dismiss

this appeal and being fully advised of and concerning the premises, are of the opinion that the said appeal is not well taken.

Therefore, it is considered and ordered by the Court that said appeal be and the same is hence dismissed.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of Said Court this 11th day of January, 1967.

Mrs. Earle Benjamin Searcy, Clerk.

APPENDIX C-1.

(Order of Illinois Supreme Court, case No. 40209, dated January 11, 1967. Certified in Record D, pg. 17.)

State of Illinois, } ss.
Supreme Court. }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January in the year of our Lord, one thousand nine hundred and sixty-seven, within and for the State of Illinois.

Be It Remembered, that, to-wit: on the 11th day of January, A. D. 1967, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois,
Appellee,
No. 40209 vs.
Kenneth A. Green,
Appellant.

Appeal from
Appellate Court
Fourth District
65-Y-261
10758

And now, on this day, the Court having duly considered the motion by appellant to strike motion to dismiss appeal, and being now fully advised of and concerning the premises;

It Is Hereby Ordered that the motion by appellant to strike motion to dismiss appeal be, and the same is, denied.

APPENDIX D.

(Stage of proceedings where federal constitutional questions were first raised.)

Motion in trial court for Arrest of Judgment or for a New Trial, stating, among other things: "The verdict and judgment are void and unlawful for the reason that the verdict shows on its face that it violates Amendment V of the United States Constitution which provides in part as follows: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb'" (Abstract pgs. 56, 57) (Record D, pg. 2, pgs. 56, 57 in Abstract attached).

The Court: The motion will be denied (Abstract pg. 58) (Record D, pg. 2, pg. 58 in Abstract attached).

APPENDIX E.

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . .

Amendment V, U. S. Constitution.

APPENDIX F.

Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XIV, U. S. Constitution.

APPENDIX G.

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Illinois Constitution, Article 2, Section 10;
Illinois Revised Statutes, 1965, Vol. 1, Pg. 11.

APPENDIX H.

Appeals from the final judgments of circuit courts shall be directly to the Supreme Court as a matter of right only (a) in cases involving revenue, (b) in cases involving a question arising under the Constitution of the United States or of the State, (c) in cases of habeas corpus, and (d) by the defendant from sentence in capital cases. Subject to law hereafter enacted, the Supreme Court has authority to provide by rule for appeal in other cases from the circuit courts directly to the Supreme Court.

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right only (a) in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court, and (b) upon the certification by a division of the Appellate Court that a case decided by it involves a question of such importance that it should be decided by the Supreme

Court. Subject to rules, appeals from the Appellate Court to the Supreme Court in all other cases shall be by leave of the Supreme Court.

(Illinois Constitution, Article 6, Section 5; Illinois Revised Statutes, 1965, Vol. 1, pg. 18.)

APPENDIX I.

A. Appeals from the final judgments of circuit courts shall be taken directly to the Supreme Court: (a) in cases involving revenue, (b) in cases involving a question arising under the constitution of the United States or of this State, (c) in cases of *habeas corpus*, (d) by the defendant from judgment and sentence in capital cases, (e) in proceedings to review orders of the Industrial Commission, and (f) in proceedings to review orders of the Illinois Commerce Commission.

(Illinois Supreme Court Rule 28-1; Illinois Revised Statutes, 1965, Chapter 110, Sect. 101.28-1; Vol. 2, pg. 1556).

APPENDIX J.

(3) (a) Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court.

(Illinois Supreme Court Rule 32 (3) (a); Illinois Revised Statutes, 1965, Chapter 110, Sect. 101.32 (3) (a); Vol. 2, pg. 1558.)

APPENDIX K.

Motions in this court shall be filed with the clerk at least one day before they are presented to the court and be submitted at least one day before the cause stands

for hearing. All motions will be presented by the clerk immediately after the daily announcements of the court but at no other time during the day, except in case of necessity or in relation to a cause when called in course. All motions and suggestions in support thereof shall be in writing. If the motion is based on matter that does not appear of record it shall be supported by affidavit. Before a motion can be filed, proof that a copy of the motion and suggestions, if any, in support thereof has been served on counsel for the opposite party at least 24 hours before the motion is presented for filing shall be filed with the clerk, unless the service shall be shown by affidavit to be impracticable. Objections to motions must be in writing and be filed within 24 hours after the motion is presented to the clerk for filing. All motions shall be submitted, without oral argument, upon the written suggestions and affidavits for and against the motions.

(Illinois Supreme Court Rule 49; Illinois Revised Statutes, 1965, Chapter 110, Section 101.49; Vol 2; pg. 1565.)

APPENDIX L.

(Certified in Record E, pgs. 1-10.)

Indictment.

Count Five.

Now on This 5th Day of April, 1965, come The Grand Jurors, chosen, selected and sworn, in and for the County of Coles and the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths, and present that Kenneth A. Green on the 12th day of August, 1963, at and within the said County of Coles and State of Illinois, committed the offense of Theft in

that he, at 1700 Broadway Avenue in the City of Mattoon, knowingly exerted unauthorized control over Fifteen Thousand Dollars ($15,000.00), the property of Thomas Wickham, thereby intending to deprive Thomas Wickham permanently of the use or benefit of the property, in violation of the Criminal Code of 1961, Section 16-1.

Indictment.

Count Six.

Now on This 5th Day of April, 1965, come The Grand Jurors, chosen, selected and sworn, in and for the County of Coles and the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths, and present that Kenneth A. Green on the 12th day of August, 1963, at and within the said County of Coles and State of Illinois, committed the offense of Theft in that he, at 1700 Broadway Avenue in the City of Mattoon, knowingly exerted unauthorized control over Fifteen Thousand Dollars ($15,000.00), the property of Thomas Wickham, and knowingly used the property in such manner as to deprive Thomas Wickham permanently of the use or benefit of the property in violation of the Criminal Code of 1961, Section 16-1.

Indictment.

Count Seven.

Now on This 5th Day of April, 1965, come The Grand Jurors, chosen, selected and sworn, in and for the County of Coles and the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths, and present that Kenneth A. Green on the 12th day of August, 1963, at and within the said County of Coles and State of Illinois, committed the offense of Theft in that he, at 1700 Broadway Avenue in the City of Mattoon, knowingly exerted unauthorized control over Fifteen Thou-

sand Dollars ($15,000.00), the property of Thomas Wickham, and used the property knowing such use probably would deprive Thomas Wickham permanently of the use or benefit of the property in violation of the Criminal Code of 1961, Section 16-1.

APPENDIX M.

Theft: A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; or

(c) Obtains by threat control over property of the owner; or

(d) Obtains control over stolen property knowing the property to have been stolen by another, and

(1) Intends to deprive the owner permanently of the use or benefit of the property; or

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use benefit.

Illinois Revised Statutes, 1965, Chapter 38, Sect. 16-1.

APPENDIX N.

Forgery: (a) A person commits forgery, when with intent to defraud, he knowingly:

(1) Makes or alters any document apparently capable of defrauding another in such manner that it pur-

ports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority; or

(2) Issues or delivers such document knowing it to have been thus made or altered;

(3) Possesses, with intent to issue or deliver, any such document knowing it to have been thus made or altered.

(b) An intent to defraud means an intention to cause another to assume, create, transfer, alter or terminate any right, obligation or power with reference to any person or property.

(c) A document apparently capable of defrauding another includes, but is not limited to, one by which any right, obligation or power with reference to any person or property may be created, transferred, altered or terminated.

Illinois Revised Statutes, 1965, Chapter 38, Sect. 17-3.